EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 97-8660

Supreme Court, U.S.
FILED
1998
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October 1997 Term

IN RE ANGEL FRANCISCO BREARD

Petitioner.

PETITIONER'S REPLY BRIEF

Imminent Execution Scheduled
April 14, 1998

Alexander H. Slaughter (VSB#05916)
(Counsel of Record)
William G. Broaddus (VSB#05284)
Dorothy C. Young (VSB#31155)
McGuire, Woods, Battle & Boothe LLP
One James Center, 901 East Cary Street
Richmond, Virginia 23219
(804) 775-1000

Michele J. Brace (VSB# 36748)
Virginia Capital Representation Resource Center
1001 East Main Street, Suite 510
Richmond, Virginia 23219
(804) 643-6845

Counsel for Petitioner
Angel Francisco Breard

59 pp

A. Angel Breard Can Seek Enforcement of the International Court of Justice Order

Citing Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988), the Commonwealth asserts that Angel Breard is precluded from seeking enforcement of the Order of the International court of Justice ("ICJ") indicating that:

> The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order.

Reagan, however, is distinguishable from the case instant case in several vital respects. First, the Court of Appeals stated that the decisions of the ICJ operate between and among governments "and are not enforceable by individuals having no relation to the claim that the ICJ has adjudicated." Id. at 271, 275. In this case, no one could conceivably have a closer relation to the stay of execution ordered by the ICJ than does the condemned man, Angel Breard.

The court also stated that it did not have authority to remedy a treaty violation when "our government's two political branches, acting together, contravene an international legal norm." Id. The court then undertook a lengthy analysis of the equal status of treaties and federal statutes and the overriding effect of subsequent federal statutes upon prior inconsistent treaties. Here, the political branches of government have not sought to contravene the provisions of the Vienna Convention.

Next, in the Reagan case, the United States government asserted that it never consented to ICJ jurisdiction in cases like the Nicaragua dispute. In contrast, it is undisputed that the United States is a signatory to the Optional Protocol Concerning the Compulsory Settlement of Disputes

to the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 590 U.N.T.S. 261. The Optional Protocol provides in relevant part:

> "*Expressing their wish* to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period,
>
> *Have agreed* as follows:
>
> Article I
>
> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a party to the present Protocol.

Finally, self-executing treaties can and do create individually enforceable rights, and the Vienna Convention is such a treaty. Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring); Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996) (assuming the same); Reagan, 859 F.2d at 937-38.

The other case cited by the Commonwealth is inapposite. In Roach v. Aiken, 781 F.2d 379 (4th Cir. 1986), the petitioner sought a stay on the basis of an expected general declaration by the Inter-American Commission on Human Rights that international law would not permit the execution of a man who committed a criminal offense while under the age of 18. Expressing doubt that the action of the Commission would have any effect on the proceeding at issue and opining that the fact that the matter "*may* be considered by the Commission on Human Rights" (emphasis added) was an insufficient reason to stay or stop Roach's execution, the Fourth Circuit Court of Appeals stated: "Most importantly, we are not advised that the United States has any treaty obligation which would require the enforcement, in the domestic courts of this nation, state and federal, of any future decision of the Commission favorable to Roach." Id. at 380. In this

instance, the Vienna Convention and the Optional Protocol *do establish* treaty obligations on the part of the United States, the case *has been* considered by the ICJ, and an Order *has been entered* specifically demanding that the United States take all measures to prevent the execution *of this individual*. As discussed above, in joining the Optional Protocol, the United States agreed to submit to the jurisdiction of the ICJ with respect to the interpretation and application of the Vienna Convention.

Among the rights asserted by Paraguay in the ICJ is the right of its national to notice of his rights of consular notification and access. Application Instituting Proceedings Submitted by the Government of the Republic of Paraguay, attached as Ex. A at 8, ¶ c. The action by Paraguay in the ICJ was brought to enforce both its sovereign rights under the treaty and in the exercise of diplomatic protection of its national. I.C.J. Public sitting held Apr. 7, 1998 at 10:00 a.m., attached as Ex. B at 8. For these reasons, as well as Breard's undeniable intimate relationship to the ICJ Order requiring the United States to make every effort to cause his execution to be stayed, the rights of Paraguay and of Angel Breard are intertwined in such a way as to make a request by Breard for enforcement of the Order appropriate.

B. The Commonwealth Has Relied upon the Existence of a Plea Agreement Offer in Its Motions to Dismiss Breard's State and Federal Habeas Petitions

In 1995, after Breard had been convicted of capital murder and his appeals rejected, he filed a petition for habeas corpus in the Arlington County Circuit Court. In that petition he sought to overturn his conviction on grounds, *inter alia*, of ineffective assistance of trial counsel. The Attorney General filed a motion to dismiss Breard's habeas corpus case. *See* Ex. C. To support his motion with respect to the ineffectiveness claim, the Attorney General got Breard's trial

lawyers (Richard McCue and Robert Tomlinson) to swear in an affidavit that it had been made clear to them by Arthur Karp, the prosecutor, that if Breard would plead guilty to murdering Ruth Dickie, the Commonwealth would forego the death penalty. See Breard's Cert. Petition App. 195 ¶ 2. Attached to the affidavit was a memorandum written by Messrs. McCue and Tomlinson *before* Breard's criminal trial for capital murder outlining the decisions Angel Breard had made against their advice, including turning down the offer of a life sentence in exchange for a guilty plea. Breard's Cert. Petition App. 202.01-202.02. At their request, Breard signed this memorandum acknowledging the accuracy of what his lawyers had written. The Attorney General argued in his Motion to Dismiss that trial counsel had "advised [Breard] to plead guilty in return for a life sentence." *See* Ex. C at 11. The Motion to Dismiss was granted.

Thereafter, Breard raised a claim (not presented to the Court) on federal habeas relating to the arbitrariness and disproportionality of his death sentence and argued that it was arbitrary for the Commonwealth to offer him a life sentence in return for a guilty plea, despite the strength of the serological and DNA evidence against him, but then to seek and obtain the death penalty when he chose to go to trial and admit his guilt to the jury. In preparing to raise this claim as well as the Vienna Convention claim and the ineffective assistance of counsel claim, Breard's federal habeas counsel confirmed with trial counsel that such a plea agreement had, in fact, been offered, and the trial counsel each provided an additional affidavit so swearing. Ex. D. Again, the Commonwealth moved to dismiss Breard's Petition, and again it confirmed the existence of a plea agreement offer and argued against an ineffective assistance of counsel claim, relying in part upon trial counsel's actions with respect to the offer. Ex. E at 21. The Commonwealth noted that the affidavit relied upon in support of this argument was "made a part of the record in state court as

Respondent's State Habeas Exhibit B." Id. n.7. The Commonwealth also argued against the arbitrariness claim on default grounds and "new rule" grounds without ever hinting that no offer of a life sentence had been made. In arguing default, the Commonwealth stated: "Neither at trial, on direct appeal, in his state habeas petition nor in his state habeas appeal did Breard ever raise a claim concerning the prosecutor's decision to seek the death penalty after Breard declined to plead guilty in return for a life sentence." Id. at 33. In its "new rule" argument, the Commonwealth asserted that "to grant Breard relief on this claim, this Court would have to reach the extraordinary conclusion that any time the prosecution offers to forego a death sentence in return for a guilty plea, the Constitution forbids seeking a death sentence regardless of whether the defendant declines to accept the offer." Id. Again, the Commonwealth's motion to dismiss was granted.

On appeal to the Fourth Circuit Court of Appeals, where Breard again raised both the Vienna Convention claim and the arbitrariness claim, but no longer relied upon any ineffective assistance of counsel claims, the Commonwealth for the first time began to hedge about the existence of a life sentence plea offer. The Commonwealth at this point did not deny that such a plea agreement had been offered, but referred to the proffered plea agreement as "the prosecutor's *alleged* offer to forego the death penalty if Breard would plead guilty" (emphasis added), and asserted in a footnote that the only record of "the prosecutor's *alleged* offer" (emphasis added) was the affidavit previously procured by the Commonwealth in support of its motion to dismiss Breard's state habeas case and relied upon again by the Commonwealth in its motion to dismiss Breard's federal habeas case. Ex. F at 21 & n.6.

Now, all of a sudden, the Commonwealth claims that there was never an offer of a life sentence. This flip-flop occurred after the ruling of the International Court of Justice had made clear the possibility that a judicial body could, and, in fact, may, reasonably find that Virginia's violation of Breard's Vienna Convention rights had resulted in significant prejudice to Breard.

It is significant that, irrespective of the Commonwealth's recently adopted position that no plea agreement was offered, the only evidence in the record on this point is the affidavits of trial counsel asserting unequivocally that the prosecutor, Mr. Karp, had made clear to them that the Commonwealth would forego the death penalty if Breard would plead guilty, supported by the contemporaneously made memo signed by trial counsel and Breard. Breard's Cert. Petition App. at 195-202.02; Ex. D.

CONCLUSION

For the reasons stated above, Petitioner Angel Francisco Breard respectfully requests that his Application for a Stay of Execution be granted.

Respectfully submitted,

ANGEL FRANCISCO BREARD

By Counsel

Alexander H. Slaughter (VSB No. 05916)
William G. Broaddus (VSB No. 05284)
Dorothy C. Young (VSB No. 31155)
McGUIRE, WOODS, BATTLE & BOOTHE LLP
One James Center, 901 East Cary Street
Richmond, Virginia 23219-4030
(804) 775-1000

Michele J. Brace (VSB# 36748)
VIRGINIA CAPITAL REPRESENTATION
RESOURCE CENTER
1001 East Main Street, Suite 510
Richmond, Virginia 23219
(804) 643-6845

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Petitioner's Reply Brief was hand delivered to Donald R. Curry, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, this ____ day of April, 1998.

CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS

(PARAGUAY V. UNITED STATES OF AMERICA)

APPLICATION INSTITUTING PROCEEDINGS SUBMITTED BY THE GOVERNMENT OF THE REPUBLIC OF PARAGUAY

TO: Mr. Eduardo Valencia-Ospina
Registrar
International Court of Justice
Peace Palace
The Hague
The Netherlands

Sir:

On behalf of the Republic of Paraguay and in accordance with article 40, paragraph 1, of the Statute of the Court and article 38 of the Rules of the Court, I respectfully submit this Application instituting proceedings in the name of the Government of the Republic of Paraguay against the Government of the United States of America for violations of the Vienna Convention on Consular Relations (done on 24 April 1963) (the "Vienna Convention"). The Court has jurisdiction pursuant to article I of the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes.

Preliminary Statement

1. Article 36, subparagraph 1(b) of the Vienna Convention requires the competent authorities of a State Party to advise, "without delay," a national of another State Party whom such authorities arrest or detain of the national's right to consular assistance guaranteed by article 36. "[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State

EXHIBIT
A

if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner." *Id.*

2. As the Government of the United States stated in its Memorial in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*:

> a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations. Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others.

1980 I.C.J. Pleadings 174 (citations omitted).

3. In 1992, the authorities of the Commonwealth of Virginia, one of the federated states comprising the United States, detained a Paraguayan citizen named Angel Francisco Breard. Without advising Mr. Breard of his right to consular assistance, or notifying Paraguayan consular officers of his detention, as required by the Vienna Convention, such authorities tried and convicted Mr. Breard and sentenced him to death.

4. These actions violated the obligations owed by the United States to Paraguay under the Vienna Convention. As a result of the breach, Paraguay is entitled to *restitutio in integrum*: the re-establishment of the situation that existed before the United States failed to provide the notifications and permit the consular assistance required by the Convention.

I. THE FACTS

Municipal Court Proceedings Concerning Mr. Breard

5. On 1 September 1992, law enforcement authorities of Virginia arrested Mr. Breard on suspicion of murder. Although aware of Mr. Breard's Paraguayan nationality, the authorities at no time informed Mr. Breard of his rights to consular

assistance under article 36, subparagraph 1(b) of the Vienna Convention. Nor did the authorities ever advise Paraguayan consular officers of Mr. Breard's detention. Unaware of, and not having been apprised of, these rights, Mr. Breard could not and did not exercise them before his trial.

6. Had Mr. Breard been properly informed of his rights under the Vienna Convention, he would have communicated with his Consul, seeking the assistance provided for in article 36. In turn, Paraguay would have rendered that assistance.

7. The failure to provide the notification required by the Vienna Convention thus precluded Paraguay from protecting its interests in the United States as provided for in articles 5 and 36 of the Vienna Convention. Among other things, Paraguay could not contact its national, assist in the defense of its national (as described in paragraphs 8 and 10 below), monitor the conditions of its national's detention, or ensure that international legal norms were respected in the treatment of, and proceedings against, its national.

8. The failure to provide the required notification also precluded Paraguay from protecting its national's interests in the United States as provided for in articles 5 and 36 of the Vienna Convention. The authorities of Virginia effectively prevented Paraguayan consular officers from arranging for appropriate legal representation of Mr. Breard. Instead, the authorities themselves arranged for Mr. Breard to be represented by court-appointed counsel who were unfamiliar with Paraguayan culture and with the preconceptions concerning the criminal justice system that a Paraguayan national might be expected to have.

9. As a result of the lack of consular assistance, Mr. Breard made a number of objectively unreasonable decisions during the criminal proceedings against him, which were conducted without translation. He refused to accept the authorities' offer of life in prison in exchange for his pleading guilty to the crime. Instead, Mr. Breard insisted on risking a death sentence and confessing and denouncing his past criminal conduct at trial. Mr. Breard took these highly detrimental steps because – in the absence of advice from his consulate – he did not comprehend the fundamental differences between the criminal justice systems of the United States and Paraguay. Whereas Mr. Breard believed his confession and denunciation would appeal to the mercy of the American court, as he understood they would a court in Paraguay, in reality these acts virtually assured Mr. Breard's conviction and death sentence.

10. Consular assistance would have included advice on cultural and legal differences between Paraguay and the United States, including the desirability of

accepting or rejecting plea offers in light of those differences; an interpreter; appropriate additional or other legal counsel; identifying and communicating with family members who could provide assistance and information; supplying records, documents, and other evidence helpful to Mr. Breard's defense; transport of family members and other witnesses to Virginia to provide testimony; attendance by consular officers at court or other proceedings; collecting and presenting mitigating evidence at the sentencing phase; and other forms of assistance both legal and non-legal. Such consular assistance would have affected the result of the criminal proceeding against Mr. Breard, including any sentence imposed.

11. On 24 June 1993, Mr. Breard was convicted of murder. On 22 August 1993, the trial court imposed a death sentence. Mr. Breard's direct appeals of the conviction and sentence were denied, as was his petition to the state courts for a writ of *habeas corpus*, a collateral proceeding seeking relief from unlawful detention.

12. In the Spring of 1996, Paraguay, without benefit of information from the authorities of Virginia and the United States, finally learned that Mr. Breard was imprisoned in the United States and awaiting execution. Immediately upon learning of his situation, Paraguay, through its embassy and consulate, began rendering assistance, both legal and otherwise, to Mr. Breard. Until contacted by the Paraguayan consular representatives at that time, Mr. Breard had been entirely unaware of his rights under the Vienna Convention.

13. On 30 August 1996, with the assistance of Paraguayan consular officers, Mr. Breard took the final step available to him for challenging his conviction and sentence by filing a petition to the federal court of first instance for a writ of *habeas corpus*. For the first time, Mr. Breard claimed violations of the Vienna Convention. That court rejected the assertion of this and other claims based on a municipal law doctrine of "procedural default." *Breard v. Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996). Applying this doctrine, the court decided that, because Mr. Breard had not asserted his rights under the Vienna Convention in his previous legal proceedings, he could not assert them in the federal *habeas* proceeding. This municipal law doctrine was held to bar such relief even though, first, Mr. Breard was unaware of his rights under the Convention at the time of the earlier legal proceedings, and second, he was unaware of his rights precisely because the local authorities failed to comply with their obligations under the Convention promptly to inform him of those rights. The intermediate federal appellate court affirmed. *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998). Mr. Breard's appeal to the intermediate federal appellate court was the last means of legal recourse in the United States available to him as of right.

14. In light of the federal appellate court's affirmance of the federal trial court's denial of Mr. Breard's *habeas* petition, the Virginia court that sentenced Mr. Breard has set an execution date of 14 April 1998. Absent intervention, officials of Virginia will then, in the words of the authorizing statute, "cause the prisoner under sentence of death to be electrocuted or injected with a lethal substance until he is dead." VA. STAT. ANN. § 53.1-234.

15. By petition for a writ of *certiorari*, Mr. Breard has now requested that the United States Supreme Court exercise its discretionary authority to review the lower federal courts' decision against him and grant a stay of his execution pending that review. The Supreme Court grants less than five percent of all *certiorari* petitions submitted to it. Moreover, in cases, such as Mr. Breard's, involving an imminent execution and submitted on an expedited basis, the Court frequently does not rule on the petition and accompanying request for interim relief until days, or even hours, before the scheduled execution.

Paraguay's Efforts To Secure
Relief In The United States

16. On 16 September 1996, the Republic of Paraguay filed its own civil lawsuit in a federal court of first instance against the municipal officials responsible for Mr. Breard's arrest, conviction, continuing imprisonment, and pending execution, alleging violations of the Vienna Convention. Paraguay sought, among other relief, an order vacating Mr. Breard's conviction, barring the municipal officials from taking any future actions based on that conviction, including refraining from putting Mr. Breard to death, and requiring those officials to afford Paraguay its rights under the Convention in any future proceedings should Virginia, as Paraguay would expect, seek to prosecute Mr. Breard anew.

17. Paraguay did not seek from the federal court of first instance, and does not intend to seek from this Court, any relief barring the competent authorities of the United States from enforcing its criminal law or, specifically, retrying Mr. Breard if the competent authorities are so advised. Paraguay does contend, however, that the competent authorities of the United States must enforce the criminal law by means that comport with the obligations undertaken by the United States in the Vienna Convention.

18. On 27 November 1996, without having considered the merits of Paraguay's claim, the federal court of first instance held that it could not take

jurisdiction of the case because it was barred by a municipal doctrine providing sovereign immunity to the several states that comprise the United States. *Paraguay v. Allen*, 949 F. Supp. 1269 (E.D. Va. 1996). Paraguay appealed the decision, which was affirmed. *Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998). During the appellate proceedings, the United States took the position that although the Vienna Convention is of great importance to United States nationals abroad, the issue of its own violation of the Convention was not justiciable in the courts of the United States in an action brought by another State Party to the Convention.

19. Paraguay has filed a petition for a writ of *certiorari* in the United States Supreme Court seeking review of the appellate decision. As explained above, a petition for *certiorari* is a matter of the Supreme Court's discretion and is rarely granted.

20. In addition to its efforts to have its claim heard in the courts of the United States, Paraguay has also engaged in diplomatic efforts to gain the assistance of the United States in remedying the effect of the breach of the Vienna Convention. In a letter dated 10 December 1996, the Ambassador of Paraguay sought the good offices of the United States Department of State, "in order that a new trial may be granted Paraguayan citizen Angel Breard within the framework of constitutional guarantees for proper defense against a criminal accusation as well as the strict fulfillment of the stipulations of international treaties covering acts of such nature." In a response delivered 3 June 1997, the Department of State expressed disagreement with Paraguay's legal position and offered no assistance to Paraguay in exercising its rights under the Treaties.

II. THE JURISDICTION OF THE COURT

21. Under article 36, paragraph 1 of the Statute of the Court, "[t]he jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force."

22. The Republic of Paraguay and the United States are, as members of the United Nations, parties to the Statute, and are parties to the Vienna Convention and to its Optional Protocol Concerning the Compulsory Settlement of Disputes. Article 1 of the Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the

International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

23. Paraguay therefore submits that, upon the filing of the present application, the matters in dispute between Paraguay and the United States concerning Paraguay's claims under the Vienna Convention lie within the compulsory jurisdiction of the Court.

III. THE CLAIMS OF THE REPUBLIC OF PARAGUAY

24. The Government of the Republic of Paraguay claims that:

a. Pursuant to article 36, subparagraph 1(b) of the Vienna Convention, the United States is under the international legal obligation to Paraguay, a State Party to the Convention, to inform "without delay" any Paraguayan national, such as Mr. Breard, who is "arrested or committed to prison or to custody pending trial or is detained in any other manner" of his rights under that subparagraph. These rights include:

i. the right, if the national arrested or detained so requests, to have the competent authorities of the receiving State inform the local consular post of the sending State that that State's national has been so arrested or committed to prison or to custody pending trial or detained in any other manner;

ii. the right to have the competent authorities of the receiving State forward any communication "addressed to the consular post from the person arrested, in prison, custody or detention . . . without delay."

The United States has violated and is currently violating the foregoing obligations.

b. Pursuant to article 36, subparagraph 1(b) of the Vienna Convention, the United States is under the international legal obligation to an arrested national of Paraguay, such as Mr. Breard, to inform him "without delay" of his rights under that subparagraph. These rights include:

i. the right, if the national arrested or detained so requests, to have the competent authorities of the receiving State inform the local consular post of the sending State that that State's national has been so arrested or committed to prison or to custody pending trial or detained in any other manner;

ii. the right to have the competent authorities of the receiving State forward any communication "addressed to the consular post from the person arrested, in prison, custody or detention . . . without delay."

The United States has violated and is currently violating the foregoing obligations with respect to Mr. Breard.

c. Pursuant to article 36 of the Vienna Convention, the United States is under the international legal obligation to ensure that Paraguay can communicate with and assist an arrested national prior to trial. Its failure to provide the notifications required by article 36, subparagraph 1(b) of the Vienna Convention has effectively prevented Paraguay from exercising its right to carry out consular functions pursuant to articles 5 and 36 of the Convention. The United States therefore has violated and is currently violating the foregoing obligation.

d. Pursuant to article 36, paragraph 2, of the Vienna Convention and article 26 of the Vienna Convention on the Law of Treaties (done on 23 May 1969), the United States is under an international legal obligation to ensure that its municipal law and regulations enable full effect to be given to the purposes of the rights accorded under article 36. The United States has violated and is currently violating the foregoing obligation.

e. Pursuant to article 27 of the Vienna Convention on the Law of Treaties and to customary international law, the United States may not derogate from its international legal obligation to uphold the Vienna Convention based upon its municipal law doctrines and rules, nor upon the basis that the acts in derogation are those of a subordinate organ or constituent or judicial power. The United States has violated and is currently violating the foregoing obligation.

IV. THE JUDGMENT REQUESTED

25. Accordingly, the Republic of Paraguay asks the Court to adjudge and declare:

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing Angel Francisco Breard, as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by articles 5 and 36 of the Vienna Convention;

(2) that Paraguay is therefore entitled to *restitutio in integrum*;

(3) that the United States is under an international legal obligation not to apply the doctrine of "procedural default," or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under article 36 of the Vienna Convention; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against Angel Francisco Breard or any other Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place; and

(3) the United States should provide Paraguay a guarantee of the nonrepetition of the illegal acts.

V. JUDGE *AD HOC*

26. In accordance with the provisions of article 31 of the Statute and article 35, paragraph 1, of the Rules, the Republic of Paraguay declares its intention to exercise its right to name a judge *ad hoc*.

VI. RESERVATION OF RIGHTS

27. The Republic of Paraguay reserves the right to modify and extend the terms of this Application, as well as the grounds invoked.

VII. PROVISIONAL MEASURES

28. The Republic of Paraguay requests that the Court indicate interim measures of protection, as set forth in a separate request filed concurrently with this Application.

* *

I have the honor to reassure the Court of my highest esteem and consideration.

Brussels, 3 April 1998

His Excellency Manuel María Cáceres
Ambassador of the Republic of Paraguay to the Kingdom of Belgium and the Kingdom of the Netherlands

CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS

(PARAGUAY V. UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION SUBMITTED BY THE GOVERNMENT OF THE REPUBLIC OF PARAGUAY

Brussels, 3 April 1998

1. I have the honor to refer to the Application submitted to the Court this day instituting proceedings in the name of the Republic of Paraguay against the Government of the United States of America and to submit, in accordance with article 41 of the Statute of the Court and articles 73, 74, and 75 of the Rules of the Court, an urgent request that the Court indicate provisional measures to preserve the rights of the Republic of Paraguay. The Court has jurisdiction pursuant to article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations.

2. The compelling facts underlying this request are set forth in the Application. On 1 September 1992, law enforcement officials of the Commonwealth of Virginia, one of the United States of America, arrested a national of Paraguay, Angel Francisco Breard. Mr. Breard was subsequently convicted and sentenced to death. At no time did these officials inform Mr. Breard of his right to communicate with his consulate, as required under article 36 of the Vienna Convention. Mr. Breard was and thus remained unaware of his rights under the Convention. As a result, Paraguay was not alerted to Mr. Breard's situation and was unable to exercise its right to render consular assistance until after he had already been tried, convicted, and sentenced.

3. Paraguay was therefore unable to protect its interests as provided for in articles 5 and 36 of the Vienna Convention. Similarly, it was unable to protect its detained national's interests as provided for in those articles.

4. As set forth in the Application, Paraguay submits that the actions of the Virginia officials, attributable to the United States, violated international legal obligations that the United States owes to Paraguay in its own right and in the exercise of its right of diplomatic protection of its national. As further set forth in the Application, Paraguay has requested that the Court declare that the United States has violated its obligations under the Vienna Convention; that the United States is obligated to restore the *status quo ante*; and that the United States is obligated to ensure that any future detention of or criminal proceedings against Mr. Breard or any other Paraguayan national in its territory be carried out in conformity with the international legal obligations the United States owes Paraguay.

5. By order dated 25 February 1998, the Circuit Court of Arlington County, Virginia, United States of America, has ordered that on 14 April 1998, pursuant to Virginia Code § 53.1-234, Mr. Breard be electrocuted or injected with a lethal substance until he is dead.

6. The importance and sanctity of an individual human life are well established in international law. As recognized by article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law.

7. Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr. Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favor.

8. On behalf of the Government of Paraguay, I therefore respectfully request that, pending final judgment in this case, the Court indicate:

a. That the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case;

b. That the Government of the United States report to the Court the actions it has taken in pursuance of subparagraph (a) immediately above and the results of those actions; and

c. That the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision this Court may render on the merits of the case.

9. In view of the extreme gravity and immediacy of the threat that authorities in the United States will execute a Paraguayan citizen in violation of obligations the United States owes to Paraguay, Paraguay respectfully asks the Court to treat this request as a matter of the greatest urgency.

10. The Government of the Republic of Paraguay has authorized the undersigned to appear before the Court in any proceedings or hearings relating to this request that the Court may convene in accordance with the terms of article 74, paragraph 3, of the Rules of the Court.

His Excellency Manuel María Cáceres
Ambassador of the Republic of Paraguay to the Kingdom of Belgium and the Kingdom of the Netherlands

Uncorrected

Non-corrigé

CR 98/7

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1998

Public sitting

held on Tuesday 7 April 1998, at 10 a.m., at the Peace Palace,

Vice-President Weeramantry, Acting President, presiding

in the case concerning the Application of the Vienna Convention on Consular Relations (Paraguay v. United States of America)

Request for the Indication of Provisional Measures

VERBATIM RECORD

ANNEE 1998

Audience publique

tenue le mardi 7 avril 1998, à 10 heures, au Palais de la Paix,

sous la présidence de M. Weeramantry, vice-président, faisant fonction de président

en l'affaire de l'Application de la convention de Vienne sur les relations consulaires (Paraguay c. Etats-Unis d'Amérique)

Demande en indication de mesures conservatoires

COMPTE RENDU

EXHIBIT B

inform the consular p[illegible]f the sending State. Finally, any communica...on by the national to the consular post must be forwarded to the authorities, again "without delay".

Subparagraph *(c)* describes the consular officers' procedural rights with respect to detained nationals. They have the right to visit and to correspond and to converse and to arrange for legal representation.

Paragraph 2 of Article 36 provides that all of these rights "shall be exercised in conformity with the laws and regulations of the receiving State". That provision, however, is subject to the proviso that "the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under the Article are intended". Thus, while States have the authority to regulate the means by which consular rights are exercised, the municipal laws and regulations cannot operate to deprive the consular officers or the national of the rights granted; to the contrary, the proviso — which was adopted over an alternative that would have permitted substantial dilution of the rights granted by way of municipal law requirements — makes clear that the municipal laws must ensure that "full effect" be given to such rights.

I should point out that Article 36 in Paraguay's view creates rights not only for the State party, but also for the detained national.

And as the Court will have noted, Paraguay in this case seeks redress for both categories of rights. It brings the action on its own behalf for violations of rights owed to it, and it also brings the action in the exercise of diplomatic protection in light of the breach of duties owed to its national.

3. Jurisdiction

Finally, the Vienna Convention includes an Optional Protocol, again to which both Paraguay and the United States are parties.

Article I of the Protocol provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction" of this Court, the Application may be brought by any party to the dispute being a party to the Protocol.

I will address jurisdiction more fully after Mr. Legum has advised the Court of the relevant facts. For the moment, I simply wish to point out that Paraguay founds jurisdiction in this case on Article I of the Optional Protocol.

I turn now to Mr. Legum.

The VICE-PRESIDENT: Thank you, Mr. Donovan. Mr. Legum, please.

Mr. LEGUM:

III. FACTS

1. Introduction

Mr. President, Mr. Vice-President and distinguished Members of the Court. I will this morning summarize the facts and proceedings in the United States concerning the case of Angel Francisco Breard.

2. The Crime and the Arrest

Mr. Breard is a Paraguayan national. In 1986, at the age of 20, he left Paraguay to reside in the United

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

ANGEL FRANCISCO BREARD,

Petitioner

v.

CL 95-526

RONALD J. ANGELONE, DIRECTOR,

Respondent

MOTION TO DISMISS

The respondent, by counsel, moves to dismiss the petition for a writ of habeas corpus. In support of the motion, respondent says as follows:

1. On June 24, 1993, after a 3½ day trial, a jury in this Court convicted the petitioner of capital murder and attempted rape. The jury fixed his punishment for the attempted rape at 10 years imprisonment and a fine of $100,000. After a separate day-and-a-half sentencing proceeding, the jury sentenced Breard to death for the capital offense, finding that he represented a continuing serious threat to society and that his offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim. This Court imposed sentence in accordance with the jury's verdicts and entered final judgment on September 9, 1993.

2. The convictions and sentences were affirmed by the Supreme Court of Virginia on June 10, 1994. Breard v. Commonwealth, 248 Va. 68, 445 S.E.2d 670 (1994). The United

HAWKS - 5"
BENNETT - 4"
GARRETSON - 5", 15"
BUNCH - 14
CUPPULLA - 4
EVANS - 11"
BRAMEN - 6
GEORGE - 14
HAWKS - 5"
EATON - 2"
WALLACE - 5", 9
CLAYTON - 5, 9
STRICKLER 6
STRICKLAND - 6, 15"
JIMMONS - 20
SPENCER II - 21
SPENCER II - 23
WHITLEY - 9
SCOTT - 27
KIMMELMAN
MARTIN - 15
MASSEY - 9

EXHIBIT C

States Supreme Court denied Breard's certiorari petition on October 31, 1994. Breard v. Virginia, 115 S.Ct. 442 (1994).

3. Breard's habeas corpus petition raises the following claims:

I. Not informing the jury as to Breard's parole eligibility violated the Constitution;

II. The trial court's response to the jury's question regarding its ability to recommend a sentence of life without parole violated the Constitution;

III. The Virginia Supreme Court's failure to provide "meaningful" review on direct appeal violated the Constitution;

IV. The Virginia death penalty is unconstitutional in the following respects:

(A) The penalty-stage instructions fail to provide adequate guidance regarding mitigation;

(B)(1) The "vileness" factor is unconstitutionally vague;

(B)(2) The "vileness" factor, as applied, denies notice and an opportunity to be heard;

(B)(3) The "future dangerousness" factor is unreliable;

(B)(4) The "future dangerousness" factor is unconstitutionally vague;

(B)(5) The "future dangerousness" factor is unconstitutional because it permits the consideration of unadjudicated misconduct that need not be proven beyond a reasonable doubt;

(C)(1) The death penalty is imposed arbitrarily;

(C)(2) The death penalty is imposed in a discriminatory manner;

(C)(3) The death penalty violates evolving standards of decency;

(C)(4) The death penalty is excessive and does not deter homicides;

(D) The trial court's review of a jury's death sentence is unconstitutional.

V. Petitioner was denied the right to an impartial jury in the following respects:

(A) He was denied additional peremptory strikes and individual, sequestered voir dire;

(B)(1) The trial court improperly struck Juror Broffman for cause;

(B)(2) The trial court improperly refused to strike certain jurors:

(a) Pauline Davis
(b) Jane Healy – SLATION DENIED
(c) Katherine Biggs-Silver
(d) Kenneth Millard
(e) Frederick Sorrell
(f) Bonnie Courtnuy–

(C)(1) "Death qualifying" the jury violated the Constitution;

(C)(2) The petit jury, jury pool and/or venire may have been under-representative of blacks, women, etc.[1]

VI. The trial court improperly admitted photographs of the victim and the crime scene;

VII. The denial of a bill of particulars violated the Constitution;

---

[1] Breard does not designate Claims V(C)(1) and V(C)(2) as such in his petition. He merely states them in paragraphs 97 and 98.

VIII. The admission of testimony from the victim's mother and the trial court's denial of a mistrial violated the Constitution;

IX. The trial court's guilt-stage instructions violated the Constitution in the following respects:

(A) The definition of "irresistible impulse;"

(B) The definition of "premeditation;"

(C) The definition of "voluntary intoxication;"

(D) Insanity

(E) Inference of malice

X. Allowing the prosecutor to ask expert witnesses if they had been retained by the defense, and allowing the prosecutor to argue to the jury that the experts had been hired by the defense, violated the Constitution;

XI. The prosecutor violated the Constitution when he argued that a psychiatrist would say that Breard represents a future danger;

XII. The trial court's penalty-stage instructions were unconstitutional;

XIII. Trial counsel were constitutionally ineffective in the following respects:

(A) Inadequate mitigation investigation;

(B) Failure to request mistrial or cautionary instruction regarding prosecutor's penalty-stage argument;

(C) Improper notice to the prosecution regarding insanity/mitigation;

(D) Inadequate cross-examination;

(E) Failure to request DNA expert;

(F) Failure to ask trial court to inform jury regarding petitioner's eligibility for parole;

(G) Failure to make timely request for mistrial regarding testimony by victim's mother;

(H) Failure to request mistrial regarding Juror Courtnuy;

(I) Failure to object to refusal of defense instruction on irresistible impulse;

(J) Failure to object to refusal of defense instruction on premeditation;

(K) Failure to request an interpreter for petitioner;

XIV. Petitioner's death sentence violates the Constitution because it is arbitrary, excessive and disproportionate.

4. Before addressing Breard's claims, the respondent respectfully directs the Court's attention to the following legal principles and standards:

Hawks v. Cox

If a claim was litigated and decided by the Supreme Court of Virginia on direct appeal, the claim cannot be relitigated in a habeas corpus proceeding. Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970). In both capital and non-capital cases, the Virginia Supreme Court routinely applies Hawks v. Cox to bar habeas review of claims that were litigated on direct appeal.

Slayton v. Parrigan

If a claim could have been raised at trial and/or on direct appeal, habeas relief is barred. See Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975). See also Barefoot v. Estelle, 463 U.S. 880, 887 (1983) ("direct appeal is the primary

avenue for review of a conviction or sentence, and death penalty cases are no exception"). The Supreme Court of Virginia consistently has refused to allow consideration in habeas corpus proceedings of claims which were defaulted either at trial or on appeal. See, e.g., Strickler v. Murray, 249 Va. 120, 126, 452 S.E.2d 648, 651 (1995); Coppola v. Warden, 222 Va. 369, 373, 282 S.E.2d 10, 12 (1981).

Strickland v. Washington

Allegations of ineffective assistance of counsel are governed by Strickland v. Washington, 466 U.S. 668 (1984). See Strickler v. Murray, 249 Va. at 127-129, 452 S.E.2d at 651. In Strickland, the Court held that the petitioner bears the burden of showing that counsel's performance was objectively deficient and that the deficient performance prejudiced the defense. 466 U.S. at 687. The Strickland standard is both "rigorous" and "highly demanding." Kimmelman v. Morrison, 477 U.S. 365, 381-382 (1986).

The first prong of the Strickland test, the "performance" inquiry, requires a showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. In judging the particular act or omission, the question is whether it was reasonable considering all the circumstances. Id. at 688. The reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," a presumption that requires rejection of the claim if the conduct might have been the result of trial tactics or strategy. Id. at 689; Darden v. Wainwright, 477 U.S. 168, 186 (1986).

The second prong of the Strickland test, the "prejudice" inquiry, requires a showing that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." 466 U.S. at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." Id.

Counsel's errors, even if unreasonable, must be shown to have "actually had an adverse effect on the defense," id. at 693, not merely that the errors created the "possibility of prejudice but that they worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions." See Murray v. Carrier, 477 U.S. 478, 494 (1986) (emphasis in original). "Thus, if a defendant challenges a death sentence such as the one at issue in this case, the defendant must show that there is a reasonable probability that absent counsel's errors, the sentencer, including an appellate court to the extent it may weigh evidence, would have concluded that the balance of aggravating and mitigating circumstances did not warrant the imposition of a death sentence." Whitley v. Bair, 802 F.2d 1487, 1493 (4th Cir. 1986), cert. denied, 480 U.S. 951 (1987).

Finally, since the petitioner's burden is two-fold, the reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice" issue. Strickland, 466 U.S. at 697. "Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." Id. Thus, if a court can dismiss an ineffectiveness claim on the ground of lack of prejudice, the court should do so without scrutinizing counsel's performance or conducting an evidentiary hearing. Id. See also Strickler, 249 Va. at 129-130, 452 S.E.2d at 652.

7. Many of Breard's claims obviously are the very same claims he litigated on direct appeal before the Virginia Supreme Court. This Court clearly does not have the authority to

second-guess the Supreme Court's judgment and must rule that the following claims are barred under Hawks v. Cox:

Claim II	decided in Breard, 248 Va. at 87, 445 S.E.2d at 681
Claim IV(A)	248 Va. at 74, 445 S.E.2d at 674-675
Claim IV(B)(1)	248 Va. at 74, 445 S.E.2d at 675
Claim IV(B)(2)	248 Va. at 74, 445 S.E.2d at 675
Claim IV(B)(3)	248 Va. at 74, 445 S.E.2d at 675
Claim IV(B)(4)	248 Va. at 74, 445 S.E.2d at 675
Claim IV(B)(5)	248 Va. at 74-75, 445 S.E.2d at 675
Claim IV(C)(1)	248 Va. at 75, 445 S.E.2d at 675
Claim IV(C)(2)	248 Va. at 75, 445 S.E.2d at 675
Claim IV(C)(3)	248 Va. at 75, 445 S.E.2d at 675
Claim IV(C)(4)	248 Va. at 75, 445 S.E.2d at 675
Claim IV(D)	248 Va. at 75-76, 445 S.E.2d at 675-676
Claim V(A)	248 Va. at 75, 445 S.E.2d at 675
Claim V(B)(1)	248 Va. at 77-78, 445 S.E.2d at 676-677
Claim V(B)(2)(a)	248 Va. at 79, 445 S.E.2d at 677
Claim V(B)(2)(c)	248 Va. at 79-80, 445 S.E.2d at 677
Claim V(B)(2)(d)	248 Va. at 80, 445 S.E.2d at 677
Claim V(B)(2)(e)	248 Va. at 80, 445 S.E.2d at 677
Claim VI	248 Va. at 81-82, 445 S.E.2d at 678
Claim XII	248 Va. at 86-87, 445 S.E.2d at 681

RULE ORDER TO INCLUDE THESE

VULNERABLE-

8. Many of Breard's claims are procedurally barred under the rule of Slayton v. Parrigan. These claims fall into three different categories:

1 — Claims already ruled barred by the Virginia Supreme Court

- Claim V(B)(2)(b) – 248 Va. at 80, 445 S.E.2d at 677-678[2]
- Claim V(B)(2)(f) – 248 Va. at 80, 445 S.E.2d at 678
- Claim VIII – Bill of Particulars – 248 Va. at 81, 445 S.E.2d at 678

2 — Claims never raised at trial and/or on direct appeal

- Claim I[3]
- Claim III[4]
- Claim V(C)(2) –
- Claim V(C)(4) –
- Slayton Barrier – Claim IX(E).

[2] The Virginia Supreme Court ruled not only that this claim was barred by Breard's failure to renew his motion regarding Juror Healy, but that Breard could not have been prejudiced in view of the fact that the prosecutor, not Breard, used a peremptory strike to remove Healy from the panel. 248 Va. at 80, 445 S.E.2d at 677-678.

[3] The record shows not only that Breard did not raise this claim at trial or on appeal, but that when the jury asked a question about parole he affirmatively agreed that the jury should not be told about his parole eligibility. (Trial Tr. 6-25-93 at 115).

[4] While Breard raised a pretrial claim about the Virginia Supreme Court's review of death penalty cases generally, he never raised a claim on direct appeal about the review that Court conducted in his case. If Breard believed that the Court had erred in its review, he could have filed a petition for rehearing bringing the alleged error to the Court's attention. Having failed to do so, he cannot litigate the claim in a habeas proceeding. Slayton v. Parrigan.

Claims raised on direct appeal but only as a matter of state law

All of the claims in Breard's petition are couched in terms of violations of the federal Constitution. Many of these federal claims are barred under Slayton, however, because when Breard litigated the matters on direct appeal he never raised them as a federal constitutional claim:[5]

Claim VII - [to the extent the claim is raised as a matter of state law, it is barred under Hawks v. Cox; see Breard, 248 Va. at 76, 445 S.E.2d at 675]

Claim IX(A) - [even if the claim had been raised as a federal issue, it is barred under Slayton because it was ruled barred on direct appeal; see 248 Va. at 83, 445 S.E.2d at 679]

Claim IX(B) - [with respect to the granting of Instruction 11 and the refusal of Instruction B, the claim also would be barred under Slayton because it was ruled barred on direct appeal, see 248 Va. at 83, 445 S.E.2d at 679; to the extent the refusal of Instruction L is raised as a matter of state law, relief is barred under Hawks v. Cox, see Breard, 248 Va. at 83, 445 S.E.2d at 679]

Claim IX(C) - [to the extent the claim is raised as a matter of state law, it is barred under Hawks v. Cox; see Breard, 248 Va. at 83-84, 445 S.E.2d at 679]

Claim IX(D) - [to the extent the claim is raised as a matter of state law, it is barred under Hawks v. Cox; see Breard, 248 Va. at 84, 445 S.E.2d at 679]

Claim X - [to the extent the evidentiary claim is raised as a matter of state law, it is barred under Hawks v. Cox; see Breard, 248 Va. at 82, 445 S.E.2d at 678-679; the claim regarding the prosecutor's argument is barred in any event under

[5] To assist the Court in determining that Breard never raised these claims on appeal as federal constitutional violations, the Director has submitted a copy of Breard's brief in the Virginia Supreme Court. (Respondent's Exhibit A).

Slayton v. Parrigan because it was ruled barred on direct appeal; see 248 Va. at 82, 445 S.E.2d at 679]

Claim XI [even if the claim had been raised as a federal issue, it would be barred under Slayton v. Parrigan because it was ruled barred on direct appeal; see 248 Va. at 87 n.2, 445 S.E.2d at 681 n.2]

Claim XIV [even if the claim is raised as a matter of state law, it is barred under Hawks v. Cox; see Breard, 248 Va. at 87-89, 445 S.E.2d at 681-682]

9. All of Breard's various ineffective counsel claims are without merit and should be dismissed for failure to satisfy the demanding Strickland standard:

Claim XIII(A). Investigating and presenting mitigation evidence

Breard's contention that his trial counsel were ineffective with respect to the investigation and presentation of mitigation evidence is frivolous. The record shows that counsel presented a substantial case in mitigation of punishment. Under no circumstances, can Breard satisfy either prong of the stringent Strickland standard.

The affidavit of Breard's trial counsel shows that because the evidence of guilt was overwhelming and because Breard readily admitted his guilt, they advised him to plead guilty in return for a life sentence. (Respondent's Exhibit B, affidavit of Richard J. McCue and Robert L. Tomlinson, II, at ¶¶ 4-5). Once Breard rejected that advice and insisted upon pleading not guilty and upon testifying and admitting his guilt, counsel concentrated upon investigating possible mitigation evidence. (Resp. Ex. B at ¶ 6).

With respect to possible mental or medical mitigation, counsel took the extraordinary step of seeking and obtaining the appointment of three defense experts -- Drs. Miller (psychiatrist),

19.2-264.4

Teagarden (clinical psychologist) and McPherson (medical neurologist) -- to examine and evaluate Breard. (Resp. Ex. B at ¶¶ 4, 7). Counsel obtained Breard's medical records, had them translated into English and submitted them to the defense experts. None of these expert evaluations, however, produced any mitigation evidence worth using. Counsel decided as a matter of trial strategy that the risk of presenting these experts at the penalty stage outweighed any possible benefit. (Resp. Ex. B at ¶ 7). What little "mitigation" evidence these experts possessed, however, trial counsel elicited on cross-examination when the prosecution called them as rebuttal witnesses at the guilt stage. (Resp. Ex. B at ¶ 7; Trial Tr. 6-23-93 at 185-190, 194, 199-203, 209-210).

Counsel's tactical decision not to use the expert witnesses at the penalty-stage proceeding may not be second-guessed on habeas. Strickland, 466 U.S. at 689. Nor has Breard made any showing of Strickland prejudice. He does not proffer or suggest any mental or medical mitigation evidence which counsel could have presented but did not present. Under these circumstances, there is no reasonable probability that the outcome of the penalty proceeding would have been any different.

With respect to mitigation evidence in the form of testimony from family and friends, counsel's affidavit demonstrates that they solicited such information from Breard and other members of his family, that they pursued such information, and that they presented such mitigation witnesses at trial. (Resp. Ex. B at ¶ 8). More specifically, counsel presented to the jury the testimony of Breard's mother (Trial Tr. 6-25-93 at 75-83), his boyhood friend, Reuben Brizuela (Trial Tr. 6-25-93 at 67-72), his adult friend and roommate, Abdullah Alhamarneh (Trial Tr. 6-25-93 at 7-10), and his religious counselor from the "Good News Mission," Jose

Cossio (Trial Tr. 6-25-93 at 26-33). Counsel decided as a matter of trial strategy not to present the testimony of Breard's female cousin who knew of information regarding prior violent conduct by Breard which counsel did not want to risk being elicited on cross-examination. (Resp. Ex. B at ¶ 8).

Counsel's affidavit demonstrates that the fact that Breard had been born and reared in South America did not unduly hinder their investigation of, or their ability to present, mitigation evidence. Counsel believed that they were able to present to the jury a thorough and accurate depiction of Breard's childhood, family life and background. (Resp. Ex. B at ¶ 8).

Counsel's performance with respect to the investigation and presentation of mitigation evidence was thus the epitome of effective performance. Breard, moreover, is in no position to contend that counsel were ineffective in this regard because his position at trial after he was convicted was that no mitigation should be presented and because the mitigation evidence that counsel did present was undercut by Breard's insistence (against counsel's advice) upon testifying at the penalty stage. (Resp. Ex. B at ¶¶ 9-10).

Breard also has failed to show Strickland prejudice. He has not proffered any available mitigation evidence that counsel did not present and which would have created a reasonable probability of a different result. Indeed, in view of the "vileness" of Breard's crime and the

overwhelming evidence of future dangerousness, there is no reasonable probability that any mitigation beyond what counsel presented would have made any difference in the case.[6]

Claim XIII(B). Failure to request mistrial or cautionary instruction regarding prosecutor's penalty-stage argument

During his penalty-stage jury argument, the prosecutor addressed the issue of Breard's "future dangerousness." In that context, the following exchange occurred:

> [MR. KARP]: [The defendant] says you should believe that he's not dangerous, but he won't even talk to you about what he did after the murder of Ruth Dickie. How do we know that he won't go and do -- how do we know how to evaluate him?
>
> If you ask the psychiatrist he'll tell you a very commonsensical answer.
>
> MR. McCUE: I'm going to object to anything about what a psychiatrist might say. There's no testimony about that.
>
> THE COURT: The jury understands that the words of counsel are not evidence, and define facts from that, however counsel are not limited to the exact words used by a witness and this is an interpretive argument. The jury knows that no psychiatrist said this, but it's merely the argument of counsel, so the objection in that context is overruled.

---

[6] Breard's request that this Court allow him the funds to hire an investigator "to develop" possible mitigation evidence should be denied. (Pet. 57, ¶ 198). Breard was not entitled to the appointment of such a mitigation investigator at trial, (see George v. Commonwealth) 242 Va. 264, 271, 411 S.E.2d 12, 16 (1991), and he certainly is not entitled to one now. He has offered nothing to support his "information and belief" that such an investigation would produce evidence that would create a reasonable probability of a different result. This Court should not expend public funds to finance a mere fishing expedition by a death row prisoner. In view of trial counsel's affidavit that their investigation was not hindered by the fact that Breard had grown up in South America and that they were able to present to the jury a thorough and accurate picture of his background (Resp. Ex. B at ¶ 8), as well as the overwhelming nature of the aggravating factors in this case, this Court should deny Breard's request.

> MR. KARP: You predict the way people behave in the future by the way they behave in the past. If there's a pattern of violence in a person's life, better be very careful before you say, oh, it's going to be cut off and it's never going to happen again. There are patterns in a man's life.

(Trial Tr. 6-25-93 at 99-100). Breard made no further objections to the prosecutor's argument, nor did he move for a mistrial or request a cautionary instruction.

Whether to request a mistrial and/or a cautionary instruction under such circumstances clearly is a matter of trial tactics. Breard has failed to overcome Strickland's presumption that counsel chose not to pursue the issue any further as a matter of strategy. See, e.g., Evans v. Thompson, 881 F.2d 117, 125 (1989) ("a judgment trial attorneys make routinely") Manetta v. Commonwealth, 231 Va. 123, 127-128 n.2, 340 S.E.2d 828, 830 n.2 (1986) (recognizing counsel may elect as a matter of strategy not to request a cautionary instruction).

In any event, Breard certainly has failed to show Strickland prejudice. The record reveals that, after the trial court overruled Breard's objection, the prosecutor never completed his argument about what "the psychiatrist" would "tell" the jury. Once the court made its ruling, the prosecutor merely stated, "You predict the way people [will] behave in the future by the way they behave[d] in the past."[7] (Trial Tr. 6-25-93 at 100). The trial court, moreover, reiterated to the jury that "the words of counsel are not evidence," and that what the prosecutor had said about the psychiatrist was "interpretive" and "merely the argument of counsel." (Trial Tr. 6-25-93 at 99). Under these circumstances, there is no basis for a conclusion that there is

[7] This, of course, was a perfectly permissible argument. See generally Barefoot, 463 U.S. at 897 (predictions of "future dangerousness" based upon a defendant's past conduct are made every day by judges and juries).

a reasonable probability the outcome of the penalty-stage proceeding would have been any different if counsel had requested a mistrial and/or a cautionary instruction.

Claim III(C). Improper notice to prosecution regarding insanity/mitigation

Breard contends that counsel were ineffective when they filed a pretrial notice advising the Commonwealth that the defendant might present expert evidence on the issues of sanity and/or mitigation. This claim has no merit.

The record shows that the written notice was filed by defense counsel on February 22, 1993. The record also shows, and Breard admits (Pet. 60 n.14), that as of that date Breard's trial was scheduled to begin on March 15, 1993.

Counsel's affidavit shows that they filed the notice on February 22 because Virginia Code §§ 19.2-168 and 19.2-264.3:1E required the defense to give the prosecution notice 21 days prior to trial if the defense intended to present expert evidence on the issues of sanity or mitigation. (Resp. Ex. B at ¶ 11). February 22 was 21 days prior to the then-scheduled beginning of trial on March 15. Counsel decided to file the written notice when they did because they wanted to preserve for Breard the option of presenting such expert testimony should such testimony be developed. Both of the relevant statutes gave the trial court the authority to exclude such evidence if timely notice was not given, and counsel did not want to risk such an occurrence. (Resp. Ex. B at ¶ 12).

Such tactical decisions cannot be second-guessed on habeas. Strickland, 466 U.S. at 689. If counsel had not filed the notice when they did, and if the trial court subsequently had refused to continue the case past March 15 and the defense had been prevented from presenting expert

1. AFFIDAVIT FROM ALFONZO Regarding Translation *

testimony by counsel's failure to file a timely notice, Breard no doubt now would be arguing that counsel were ineffective for failing to file the notice. As counsel's affidavit shows, however, they filed the notice to protect Breard's best interests and their actions were well within the wide range of effective assistance. See Bunch v. Thompson, 949 F.2d 1354, 1364 (4th Cir. 1991) (because counsel in capital cases will be alleged to be ineffective regardless of which strategy they pursue, "[t]he best course [for a reviewing court] is to credit plausible strategic judgments").

Breard also has failed to demonstrate Strickland prejudice with respect to this claim. He argues that there is a reasonable probability that, if his counsel had not given the written notice, the prosecution would have been unable to call the defense experts to rebut his unsupported claim of "satanic curse" insanity. (Pet. 61-62, ¶ 218). This argument defies reality.

As trial counsel's affidavit shows, the prosecution did not obtain access to the defense experts' reports as a result of the written notice filed on February 22. The reports were not turned over to the Commonwealth until after the trial began in June. The reason they were turned over at that point was because the defense had requested and obtained discovery pursuant to Rule 3A:11 and, once it became apparent at trial that the defense was going to put the defendant's sanity at issue, the prosecution was entitled to reciprocal discovery of the reports pursuant to Rule 3A:11(c)(3). (Resp. Ex. B at ¶¶ 13-14).

Finally, it is sheer folly to suggest that under any circumstances the jury would have found Breard not guilty by reason of insanity on the basis of his unsupported testimony about a "satanic curse." Breard admitted in front of the jury that on the night of the murder "he left his apartment armed with a knife because he thought he would 'try to do someone,' meaning that

he 'wanted to use the knife to force a woman to have sex with [him].'" Breard, 248 Va. at 73, 445 S.E.2d at 674. Under these circumstances, there is no reasonable likelihood that, even if the prosecution had been unable to call the defense experts as rebuttal witnesses, the result of Breard's trial would have been any different.

Claim XIII(D). Inadequate cross-examination

Breard complains about his trial counsel's cross-examination of various prosecution witnesses related to the evidence on the issue of guilt. This complaint has no merit.

Cross-examination clearly is a matter of trial strategy. Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978). Counsel's affidavit demonstrates that all of their decisions about whether or how to cross-examine the prosecution's witnesses were a product of strategy and their professional judgment as to Breard's best interests. (Resp. Ex. B at ¶¶ 15-18). More particularly, counsel determined that, once Breard had decided (against their advice) to testify and admit that he was the person who killed the victim, the defense would lose credibility with the jury if they rigorously cross-examined the prosecution's guilt-stage witnesses and then turned around and put the defendant on the stand to admit that all of the prosecution's evidence of guilt was entirely accurate. (Resp. Ex. B at ¶ 16; Trial Tr. 6-22-93 at 192). Breard fully concurred in this strategy decision. (Resp. Ex. B at ¶ 18). Counsel's tactical decision may not be second-guessed on habeas. Strickland, 466 U.S. at 689.

Breard also has failed to show Strickland prejudice. He has proffered no evidence that counsel could have elicited on cross-examination that would have made any difference in the outcome of the guilt stage of trial, let alone any evidence that would create a reasonable

probability of a different result. Indeed, in the wake of Breard's sworn testimony admitting his guilt, no showing of Strickland prejudice is now possible.

Claim XIII(E). Failure to request DNA expert

Breard has failed to satisfy either prong of the Strickland standard. Counsel's affidavit demonstrates that the decision not to request a DNA expert was a matter of trial strategy and a decision in which Breard fully concurred. (Resp. Ex. B at ¶ 19). Given Breard's decision, against counsel's advice, to testify and admit his guilt, counsel's strategy was entirely reasonable and may not be second-guessed. See Strickland, 466 U.S. at 689.

A showing of Strickland prejudice, moreover, is an impossibility in the wake of Breard's trial testimony which admitted, in effect, that the prosecutor's DNA evidence was 100% accurate. Breard has failed to proffer any concrete benefit the defense would have obtained as the result of the appointment of a DNA expert for the defense. Under these circumstances, there is no reasonable probability the result of the guilt stage of trial would have been any different if counsel had requested such an appointment.

Claim XIII(F). Failure to request trial court to inform jury regarding parole eligibility

Breard has satisfied neither prong of the Strickland standard with respect to this claim. Counsel determined as a matter of trial strategy that in deciding whether the "future dangerousness" aggravating circumstance had been established the jury should not know that a life sentence for capital murder does not mean the defendant would spend the rest of his life in prison. (Resp. Ex. B at ¶ 20). As Breard admits, he would have been eligible for parole in approximately 20 years, i.e. when he was only 47 years old. Counsel's tactical decision that

it was not in Breard's best interest for the jury to know that fact was well within the wide range of effective assistance and may not be second-guessed on habeas. Strickland, 466 U.S. at 689.

Breard also has failed to show Strickland prejudice. There is no reasonable probability of a different result because the Virginia Supreme Court has ruled that the due process rule established in Simmons v. South Carolina, 114 S.Ct. 2187 (1994), does not apply to capital defendants, like Breard, who were eligible (as opposed to ineligible) for parole. See Ramdass v. Commonwealth, 248 Va. 518, 520, 450 S.E.2d 360, 362 (1994). Thus, if counsel had made the request Breard now suggests, the trial court would have been required to deny it.

Claim XIII(G). Failure to make timely request for mistrial regarding testimony by victim's mother

When the prosecutor announced at the guilt stage that his next witness would be the victim's mother, defense counsel asked for a bench conference and objected to her testimony on relevancy grounds. (Trial Tr. 6-22-93 at 91-94). After the prosecutor represented to the court that the mother would identify the victim, testify that her daughter wore eyeglasses, and state how old Ruth was when she was killed, the trial judge ruled that he would "allow a bit of...reality background" information about the victim but that he would not permit "character" evidence. (Trial Tr. 6-22-93 at 93-94).

The victim's mother then testified, but only very briefly. When asked if she was related to Ruth Dickie, the witness responded, "She's my only child." (Trial Tr. 6-22-93 at 95). She then identified her daughter from a photograph, and testified that Ruth wore eyeglasses, was 39 years old when she was killed, and was single and lived alone. (Trial Tr. 6-22-93 at 95-96). She also testified that she had last spoken to Ruth on February 14, 1992, that she never had

heard her daughter mention the name "Angel Breard," and that she did not know of anyone who might have wanted to harm her daughter. (Trial Tr. 6-22-93 at 96-97). Defense counsel voiced no objection during the mother's testimony and elected not to cross-examine her. (Trial Tr. 6-22-93 at 97).

Three more witnesses testified and then the court announced it would take a luncheon recess. (Trial Tr. 6-22-93 at 125). After the jury left the courtroom, Breard moved for a mistrial on the basis of the mother's testimony, specifically objecting to the witness' reference to the victim as "her only child" and alleging that the mother was "sobbing as she left the stand." (Trial Tr. 6-22-93 at 127). The trial judge denied the motion. (Trial Tr. 6-22-93 at 128).

Even though on appeal the Virginia Supreme Court ruled that the claim was barred because the motion for a mistrial was untimely, this Court rejected the mistrial motion on its merits. The trial judge found, as a matter of historical fact, that the witness' reference to the victim as her only child was "spontaneous" and that the Commonwealth had acted in good faith in calling the mother as a witness. (Trial Tr. 6-22-93 at 127-128). The court also concluded that "the whole presentation by the mother was very controlled" and "minimal." (Trial Tr. 6-22-93 at 128). Under these circumstances, Breard cannot possibly satisfy either prong of the Strickland standard. Counsel's actions were sufficient to obtain a merits ruling (albeit, an adverse one) from the trial court and there is no reasonable probability that the result would have been any different if counsel had requested a mistrial in a more timely fashion. See Beavers v. Commonwealth, 245 Va. 268, 280, 427 S.E.2d 411, 420 (1993) (whether an occurrence is so prejudicial to warrant a mistrial "is a question of fact to be resolved by the trial court"); Spencer

v. Commonwealth, 240 Va. 78, 94-95, 393 S.E.2d 609, 619 (1990) (Spencer IV) (denial of mistrial affirmed despite outburst by victim's mother, bomb threat and power outage).

Claim XIII(H). Failure to request mistrial regarding Juror Courtnuy

During the voir dire of Juror Bonnie Courtnuy, when asked if she had read or heard anything about the case, she revealed that she "read one thing this morning in the paper...when [she] was waiting downstairs." (Trial Tr. 6-21-93 at 69). Upon further inquiry, Courtnuy said that the article she had seen was in "The Virginia Times," and that it merely related what the defendant was charged with and that the jury selection was to begin that day. (Trial Tr. 6-21-93 at 69-70). When asked if the article had stated anything about the facts of the case, Ms. Courtnuy responded, "I don't remember. I didn't read the whole article. I just skimmed it for about five minutes probably." (Trial Tr. 6-21-93 at 70).

Courtnuy expressly disavowed that she had formed any opinion about the case. (Trial Tr. 6-21-93 at 70). And, when asked by defense counsel whether she would remain impartial despite whatever she had read, the juror replied unequivocally, "Yes." (Trial Tr. 6-21-93 at 70-71).

The jury selection process began and was completed on June 21, 1993. The next morning, immediately before the jury was sworn, defense counsel informed the court that "[y]esterday evening" he had obtained a copy of the newspaper article that Juror Courtnuy allegedly had seen. (Trial Tr. 6-22-93 at 3). According to defense counsel, the article mentioned "other acts of violence" by Breard. (Trial Tr. 6-22-93 at 4). Counsel asked the court to remove the juror for cause and the trial judge denied the motion. (Trial Tr. 6-22-93 at 5-6).

Breard contends that his trial attorneys were ineffective because, although they moved to exclude Juror Courtnuy, they did not move for a mistrial when the trial court denied the motion. Once again, the petitioner has failed to satisfy either prong of the Strickland test.

Under Strickland, this Court must presume that Breard's trial attorneys determined as a matter of strategy that a mistrial at that point was not in Breard's best interests. Breard has offered nothing to overcome that presumption.

This Court, however, need not even reach the issue of counsel's performance because it is so clear that Breard has failed to show Strickland prejudice. See Strickland, 466 U.S. at 697; Strickler, 249 Va. at 129-130, 452 S.E.2d at 652-653. The trial court's denial of the motion to exclude Courtnuy for cause undoubtedly was correct. When asked about her exposure to the article, the juror said that she only had "skimmed it," that she had not formed any opinion on the basis of what she had read, and swore under oath that she would decide the case solely on the evidence presented. (Trial Tr. 6-21-93 at 70-71). See Spencer IV, 240 Va. at 93-94, 393 S.E.2d at 617-619 (juror's knowledge of defendant's other death sentences does not require exclusion); Spencer v. Commonwealth, 238 Va. 295, 309, 384 S.E.2d 785, 794 (1989) (Spencer II) (even where juror has formed opinion, sufficient if opinion can be laid aside). Under these circumstances, there is no basis for a conclusion that the trial court would have been required, as a matter of law, to grant a request for a mistrial. Breard, therefore, cannot demonstrate a reasonable probability that the result of his trial would have been any different if his counsel had requested a mistrial after their motion to exclude Juror Courtnuy was denied.

Claim XIII(l). Failure to object to refusal of Instruction A regarding "irresistible impulse"

Defense counsel initially proffered Instruction A on the issue of "irresistible impulse." (Trial Tr. 6-23-93 at 229). In response, the Commonwealth submitted Instruction 13. (Trial Tr. 6-23-93 at 233). After reviewing both instructions, the trial judge announced that he intended to give Instruction 13 and refuse Instruction A, but specifically told defense counsel they could "submit an alternative [instruction] in the morning." (Trial Tr. 6-23-93 at 235). The next day, counsel submitted Instruction J on the issue of "irresistible impulse," which the trial judge granted. (Trial Tr. 6-24-93 at 20-21).

Petitioner has failed to satisfy either prong of the Strickland standard. Breard has not overcome the strong presumption that his trial counsel were satisfied with the trial court's granting of Instruction J instead of Instruction A. The trial court, moreover, correctly refused Instruction A because it failed to explain that "irresistible impulse" cannot exist in the absence "mental disease" and because its use of such phrases as "moral or homicidal insanity" and "unforeseen pressure on the mind" was inappropriate and/or unsupported by any legal authority. (See Refused Instruction A). A finding of Strickland prejudice, moreover, is simply impossible

in view of the Virginia Supreme Court's finding on direct appeal that the jury was instructed properly on the issue of "irresistible impulse." See Breard, 248 Va. at 83, 445 S.E.2d at 679.[6]

Claim XIII(J). Failure to object to refusal of Instruction B regarding premeditation

With respect to the definition of "willful, deliberate and premeditated," the Commonwealth offered Instruction 11 and defense counsel submitted Instruction B. (Trial Tr. 6-23-93 at 228). After reviewing the proposals, the trial court granted Instruction 11 and refused Instruction B because it was argumentative. (Trial Tr. 6-23-93 at 229). Again, however, the court expressly stated that the refusal was "without prejudice" to Breard's attempting to submit a "less argumentative" instruction. (Trial Tr. 6-23-93 at 229).

Defense counsel subsequently submitted Instruction L, which purported to define a difference between "willful and deliberate" and "premeditated." (Trial Tr. 6-24-93 at 17). The court refused the instruction because Breard's attempt to define "premeditated" as meaning "to think out or plan beforehand" would confuse, rather than help, the jury. (Trial Tr. 6-24-93 at 17).

---

[6] Additionally, Breard could have suffered no prejudice as the result of the giving of Instruction 13 or the refusal of Instruction A because, as a matter of law, there was no evidence warranting any "irresistible impulse" instructions. The record makes clear that the trial judge did not believe Breard had presented sufficient evidence to submit the issue to the jury, but did so only out of an abundance of caution. (Trial Tr. 6-23-93 at 229-235). There simply was no evidence that Breard had a "mental disease," and his unsupported testimony that he felt "like somebody or something was manipulating [his] body" at the time of the offense (Trial Tr. 6-23-93 at 117) was insufficient as a matter of law to support an "irresistible impulse" defense. See generally Eaton v. Commonwealth, 240 Va. 236, 255, 397 S.E.2d 385, 397 (1990) (not entitled to instruction unless supported by evidence).

Breard has failed to satisfy Strickland with respect to his claim that his trial counsel were ineffective regarding their failure to object to the refusal of Instruction B. Once again, this Court must presume under Strickland that as a matter of trial strategy counsel were satisfied with Instruction L which they attempted to substitute for Instruction B. Moreover, a finding of Strickland prejudice is precluded by the Virginia Supreme Court's ruling on direct appeal that the jury was instructed properly on the issue of premeditation. See Breard, 248 Va. at 83, 445 S.E.2d at 679. There thus is no reasonable probability that the outcome of the guilt stage of Breard's trial would have been any different if his counsel had objected to the refusal of Instruction B.[9]

Claim XIII(K). Failure to request an interpreter

This claim obviously has no merit and is refuted by the record. Counsel's affidavit demonstrates that they were aware that the services of an interpreter were available if needed, that they requested and obtained an interpreter for a defense witness when the need arose, and that there simply was no need for an interpreter for Breard. (Resp. Ex. B at ¶ 21).

The record overwhelmingly supports counsel's determination that Breard did not need an interpreter. Breard's testimony at the guilt stage (Trial Tr. 6-23-93 at 103-164) and the penalty stage (Trial Tr. 6-25-93 at 15-25), as well as his colloquies with the trial court (Trial Tr. 6-23-93 at 99-102; 6-25-93 at 14), demonstrate that he did not need an interpreter. Indeed, Breard told the trial judge, under oath, that he was "fluent in" and "comfortable" with the

[9] Instruction B was erroneous and properly rejected for the same reason that the Virginia Supreme Court ruled Instruction L was erroneous -- it wrongly equated premeditated with "to think out or plan beforehand." See Breard, 248 Va. at 83, 445 S.E.2d at 679.

English language. (Trial Tr. 6-23-93 at 100). At the penalty stage, moreover, a defense witness testified that Breard was so competent with English that he served as a Bible translator for other hispanic inmates at the jail. (Trial Tr. 6-25-93 at 29-30).

In view of this record evidence, Breard's half-hearted assertion that "his understanding and fluency in English was less than perfect" (Pet. 71, ¶ 254) cannot possibly satisfy the demanding Strickland standard.

10. Each and every allegation in the petition not specifically admitted should be taken as denied.

11. Pursuant to Virginia Code § 8.01-654(B)(4), this Court should dismiss a petition for a writ of habeas corpus without an evidentiary hearing where, as here, the petitioner's claims can be fully determined on the basis of the record and the relevant law. See Yeatts v. Murray, 249 Va. 285, 287-289, 455 S.E.2d 18, 21 (1995) (proper to dismiss ineffective counsel claims without an evidentiary hearing based upon trial counsel's affidavit); Va. Code § 8.01-680 (habeas court may consider affidavits).

12. For all the foregoing reasons, Breard's petition for a writ of habeas corpus should be dismissed without an evidentiary hearing and the Director requests the Court to enter his proposed dismissal order.

Respectfully submitted,

By: _____
Counsel

DONALD R. CURRY
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 1995, a copy of the foregoing Motion to Dismiss and accompanying exhibits were mailed to Carl Womack, 2009 North 14th Street, Suite 301, Arlington, VA 22201, counsel for petitioner.

Donald R. Curry
Senior Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ANGEL FRANCISCO BREARD,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 3:96CV366
	)	
J.D. Netherland, Warden,	)	
Mecklenburg Correctional Center,	)	
	)	
Respondent.	)	

AFFIDAVIT OF ROBERT L. TOMLINSON, II

My name is Robert L. Tomlinson, II, and I state the following based on my personal knowledge:

1. Together with my co-counsel, Richard J. McCue, I represented Angel Francisco Breard in his 1993 jury trial in the Circuit Court of Arlington County for capital murder and attempted rape.

2. I had practiced law for over ten years prior to representing Mr. Breard and had handled one capital case.

3. I have had extensive experience trying felony jury cases in Arlington County.

4. Together Mr. McCue, I investigated the Commonwealth's evidence against Mr. Breard and we satisfied ourselves that the Commonwealth would be able to prove Breard's guilt beyond a reasonable doubt. We reached this conclusion based upon the evidence which the Commonwealth had based on serology, hair comparison, and DNA evidence. The Commonwealth had hairs taken from the victim's pubic region that matched Mr. Breard's and the Commonwealth had semen taken from the victim's pubic region which, based on serology

EXHIBIT
D

and DNA comparison, were matched with Mr. Breard. We were familiar with these types of evidence prior to representing Mr. Breard. We were satisfied that the Commonwealth would be able to prove its case without a guilty plea by Mr. Breard.

5. The prosecutor, Mr. Karp, made it clear to us that the Commonwealth would forego the death penalty if Mr. Breard would plead guilty.

6. Mr. Breard declined to plead guilty and the Commonwealth pursued the capital murder charge against Mr. Breard and sought the death penalty.

Further affiant saith not.

This the 28th day of August, 1996.

Robert L. Tomlinson, II

Subscribed and sworn to me before me by Robert L. Tomlinson, II this 28th day of August, 1996.

Notary Public

My Commission Expires: 1/31/99

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ANGEL FRANCISCO BREARD,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 3:96CV366
	)	
J.D. Netherland, Warden,	)	
Mecklenburg Correctional Center,	)	
	)	
Respondent.	)	

AFFIDAVIT OF RICHARD J. McCUE

My name is Richard J. McCue and I state the following based on my personal knowledge:

1. Together with my co-counsel, Robert L. Tomlinson, II, I represented Angel Francisco Breard in his 1993 jury trial in the Circuit Court of Arlington County for capital murder and attempted rape.

2. I had practiced law for nearly twenty years prior to representing Mr. Breard and had handled three capital cases.

3. I have had extensive experience trying felony jury cases in Arlington County.

4. Together Mr. Tomlinson, I investigated the Commonwealth's evidence against Mr. Breard and we satisfied ourselves that the Commonwealth would be able to prove Breard's guilt beyond a reasonable doubt. We reached this conclusion based upon the evidence which the Commonwealth had based on serology, hair comparison, and DNA evidence. The Commonwealth had hairs taken from the victim's pubic region that matched Mr. Breard's and the Commonwealth had semen taken from the victim's pubic region which, based on serology and DNA comparison, were matched with Mr. Breard. We were familiar with these types of

evidence prior to representing Mr. Breard. We were satisfied that the Commonwealth would be able to prove its case without a guilty plea by Mr. Breard.

5. The prosecutor, Mr. Karp, made it clear to us that the Commonwealth would forego the death penalty if Mr. Breard would plead guilty.

6. Mr. Breard declined to plead guilty and the Commonwealth pursued the capital murder charge against Mr. Breard and sought the death penalty.

Further affiant saith not.

This the 29th day of August, 1996.

Richard J. McCue

Subscribed and sworn to me before me by Richard J. McCue this 29th day of August, 1996.

Notary Public

My Commission Expires: 8-31-97

9/18/96

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

ANGEL FRANCISCO BREARD,

Petitioner,

v. Civil Action No. 3:95CV366

J. D. NETHERLAND, WARDEN,

Respondent.

RESPONDENT'S MEMORANDUM OF LAW

Angel Breard asks this Court to set aside a final judgment from the Circuit Court of Arlington County dated September 9, 1993, in which he was convicted and sentenced to death for the capital murder/attempted rape of Ruth Dickie. For the reasons that follow, this Court should deny the petitioner's request and dismiss his petition:

I. Statement of the Case

It is undisputed - indeed, Breard admits (Ptn. 5-6) - that he is the person who brutally murdered Ruth Dickie during the course of a sexual assault that occurred in the victim's apartment on February 17, 1992. The Virginia Supreme Court found the facts surrounding the capital offense to be as follows:

> In February 1992, the victim, Ruth Dickie, resided alone at 4410 North Fourth Road, Apartment 3, in Arlington County. She was 39 years of age and unmarried. Breard was living in an apartment a short distance from Dickie's apartment.

EXHIBIT

E

Breard's contention that his two experienced trial counsel were ineffective with respect to the investigation and presentation of mitigation evidence is frivolous. The record shows that counsel presented a substantial case in mitigation of punishment. Under no circumstances, can Breard satisfy either prong of the stringent Strickland standard.

The affidavit of Breard's trial counsel shows that because the evidence of guilt was overwhelming and because Breard readily admitted his guilt, they advised him to plead guilty in return for a life sentence. (Respondent's Exhibit I, affidavit of Richard J. McCue and Robert L. Tomlinson, III, at ¶¶ 4-5).[7] Once Breard rejected that advice and insisted upon pleading not guilty and upon testifying and admitting his guilt, counsel concentrated upon investigating possible mitigation evidence. (Id. at ¶ 6).

With respect to possible mental or medical mitigation, counsel took the extraordinary step of seeking and obtaining the appointment of *three* defense experts – Drs. Miller (psychiatrist), Teagarden (clinical psychologist) and McPherson (medical neurologist) – to examine and evaluate Breard. (Id. at ¶¶ 4, 7). Counsel obtained Breard's medical records, had them translated into English and submitted them to the defense experts. None of these expert evaluations, however, produced any mitigation evidence worth using.[8] Counsel decided as a

---

[7] This same affidavit was made a part of the record in state court as Respondent's State Habeas Exhibit B.

[8] Breard admits that the medical/mental health evaluations produced no significant mitigation evidence. (Ptn. 63, ¶ 165). Breard has proffered to this Court an affidavit from a Dr. Roque, but has not provided a Spanish-to-English translation. (Petitioner's Exhibit 10). Breard does not allege that counsel were ineffective in investigating or presenting mental health mitigation but, even if he did, Dr. Roque's affidavit could not be considered, not only because it is in Spanish, but also because it never was presented to the state courts. See § 2254(e)(2); Keeney.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-25

ANGEL FRANCISCO BREARD,

Petitioner-Appellant

v.

J. D. NETHERLAND, WARDEN,

Respondent-Appellee

On Appeal from the United States District
Court for the Eastern District of Virginia
Richmond Division

RESPONDENT-APPELLEE'S BRIEF

DONALD R. CURRY
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

EXHIBIT
F

II. THE DISTRICT COURT CORRECTLY RULED THAT BREARD'S CLAIM CONCERNING THE PROSECUTOR'S DECISION TO SEEK A DEATH SENTENCE IS BARRED BY BREARD'S UNDISPUTED FAILURE TO RAISE THE CLAIM IN STATE COURT.

Breard asserts that, given the prosecutor's alleged offer to forego the death penalty if Breard would plead guilty,[6] the prosecutor somehow violated the Constitution by seeking and obtaining a death sentence once Breard insisted upon pleading not guilty. (Pet. Br. 30). The district court correctly found that the claim was barred from federal collateral review because it never was raised in state court. See Breard, 949 F. Supp. at 1264. (App. 819-820).

The record shows that, even though the basis for the claim obviously has been known to Breard since the time of trial, the claim never was raised at trial, on direct appeal, in his state habeas petition or in his state habeas appeal. (App. 537-632, 637-691, 695-747). The law is clear that a federal claim never raised in state court is barred from federal collateral review. See Gray, 116 S.Ct. at 2080-2081; George, 100 F.3d at 363.

Even if Breard's claim were not defaulted, moreover, it certainly could not survive the "new rule" doctrine. In order to grant Breard relief on the merits, the Court would have to reach the extraordinary conclusion that any time a prosecutor offers to forego a death sentence in return for a guilty plea, the Constitution forbids seeking a death sentence regardless of whether the

---

[6] The only record of the prosecutor's alleged offer is the affidavit of Breard's trial counsel. The affidavit states that "[t]he prosecutor...had made it clear to us that the Commonwealth would forego the death penalty if Breard would plead guilty." (App. 252). Despite counsel's advice to plead guilty, Breard insisted on a jury trial. (App. 252, 260-261).

prisoner declines the offer. Merely to state such a claim not only demonstrates its impermissible "newness," but its lack of merit as well.[7]

III. NEITHER BREARD'S CLAIM THAT VIRGINIA ARBITRARILY IMPOSES THE DEATH PENALTY IN CAPITAL MURDER-RAPE CASES, NOR THE STATISTICS UPON WHICH THE CLAIM IS BASED, EVER WAS PRESENTED TO THE STATE COURTS.

Breard contends that Virginia arbitrarily imposes the death penalty in capital murder-rape cases. (Pet. Br. 31). This claim, however, never was raised on direct appeal (App. 695-747), in Breard's state habeas petition (App. 537-632), or in his state habeas appeal. (App. 637-691). Because the claim never was raised in state court and now would be barred from state court review, federal collateral review is barred as well. See Gray, 116 S.Ct. at 2080-2081; George, 100 F.3d at 363.[8]

Of course, even if the claim itself had been preserved for review, it is undisputed that the statistics upon which the claim is based (App. 205-210) never were presented by Breard until he reached federal court. Thus, federal collateral review cannot be premised upon such defaulted facts. See § 22549(e)(2); Keeney, 504 U.S. at 11-13.

---

[7] During oral argument in the court below, the judge recognized the obvious adverse implications of the rule Breard is seeking. (App. 804-805).

[8] The district court regarded this claim as essentially identical to Breard's "disproportionate death sentence" claim (see Argument IV below) and concluded that the claim had been raised in Breard's state habeas petition, that the Virginia Supreme Court had applied the default rule embodied in Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), to the claim, and that the claim was barred from federal review for that reason. See Breard, 949 F. Supp. at 1264-1265. (App. 820-821). Regardless of whether the district court is correct or the Warden is correct, the end result is the same: the claim is barred by procedural default.